

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No.: 09/870,414 Confirmation No.: 7087
Applicant(s): Anton-Lewis Usala
Filed: May 30, 2001
Art Unit: 1654
Examiner: Gupta, Anish
Title: METHOD OF TREATING CHRONIC ULCERS

Docket No.: **P63782 1050.2**
Customer No.: 26128
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PETITION UNDER 37 C.F.R §1.705(d)

Sir:

Applicant hereby petitions under 37 §1.705(d) for recalculation of the patent term adjustment indicated in the Issue Notification for the above referenced patent application, which issued on April 20, 2010, as U.S. Patent No. 7,700,660. Applicant submits that the present request for recalculation does not relate to issues that were raised, or could have been raised, in an application for patent term adjustment under 37 C.F.R. §1.705(b).

Accompanying the present petition are the following:

(1) The fee required under 37 C.F.R. §1.18(e) in the amount of \$200.00 is authorized to be charged to Deposit Account No. 09-0528.

(2) A statement of the facts involved according to the requirements of 37 C.F.R. §1.705(b)(2) is appended hereto.

It is not believed that any additional fees other than those specifically authorized above are required in the present petition. In the event that any additional fees are required, any such fees are hereby authorized to be charged to Deposit Account No. 09-0528.

Appl. No.: 09/870,414
Petition Under 37 C.F.R §1.705(d)
April 23, 2010

Respectfully submitted,

/ryan w. cagle/

Ryan W. Cagle
Registration No. 47,468

Customer No. 26158
Womble Carlyle Sandridge & Rice, PLLC
Attn: Patent Docketing
P.O. Box 7037
Atlanta, GA 30357-0037
Tel Raleigh Office (919) 755-2100
Fax Raleigh Office (919) 755-2150

**ELECTRONICALLY FILED USING THE EFS-WEB ELECTRONIC FILING SYSTEM OF THE UNITED STATES PATENT
& TRADEMARK OFFICE ON APRIL 23, 2010.**

Appendix – Statement of Facts under 37 C.F.R. §1.705(b)(2)

1. On November 30, 2009, the USPTO mailed the Notice of Allowance in the present case indicating that the patent term adjustment to date was **901 days**. This calculation appeared to include the following:

2. USPTO delay under 1.702(a)(1) for failing to issue a first action within 14 months of the filing of the patent application (the time beginning the day after the day that is 14 months from the day on which the application was filed and ending on the day of the mailing of the first action – i.e., from July 31, 2002, to November 4, 2003), which totals **462 days**;

3. USPTO delay under 1.702(a)(2) for failing to respond to Applicant's filing of an Appeal Brief within 4 months of the filing date (the time beginning the day after the day that is 4 months from the day on which the Appeal Brief was filed and ending on the day of the mailing of the non-final rejection, which was the first reply – i.e., from July 14, 2006, to May 29, 2008), which totals **685 days**; and

4. The Applicant's delay under 1.704(c) related to four separate requests for extensions of time for responding to four separate office actions, which totals **246 days**.

5. Thus, the calculation based on USPTO delays under 1.702(a) minus Applicant delay under 1.704(c) was as follows: **462 + 577 – 246 = 901**.

6. On April 20, 2010, the patent in the present case issued listing 1,592 days of patent term adjustment. In viewing the patent term adjustment history on the USPTO Patent Application Information Retrieval (PAIR) system, it is evident that the PTA in the present

case has been adjusted to include the USPTO delay under 1.702(b). This delay under 1.702(b) was calculated as the time beginning on the day after the date that is three years after the actual filing date of the application and ending on the date the patent issued, and this time did not include the time period during which the application was under appeal. Thus, the delay under 1.702(b) was calculated as follows: from May 30, 2004 (three year anniversary of filing date), to April 20, 2010 (issuance of patent), or 2,151 days, subtracting out the time on appeal from November 14, 2005, to May 29, 2008, or, 927 days, for a total delay under 1.702(b) of **1,224 days** (i.e., $2,151 - 927 = 1,224$).

7. Since the calculation of PTA provided with the Notice of Allowance did not include the USPTO delay under 1.702(b), and since the delays under 1.702(a), as described above in paragraphs 2 – 5, were unchanged between the time of the issuance of the Notice of Allowance and the time of issuance of the patent, the original PTA calculation of **901 days** for delay days under 1.702(a) should not have been altered. The final calculation of total PTA should have been attained simply by adding the **1,224 days** of delay under 1.702(b) to the **901 days** of delay under 1.702(a).

8. To simplify the above statement, the correct calculation for PTA at the time of issuance of the present patent should have been **$901 + 1224 = 2,125$**

9. It is clear from a review of the patent term adjustment history on the USPTO PAIR system that, in making the final PTA calculation, the USPTO incorrectly reduced the number of days of delay by the USPTO under 1.702(a)(2) for failing to respond to the Applicant's filing of an Appeal Brief within four months of the filing date. Although this time originally was calculated as 685 days at the time of issuance of the Notice of Allowance, the patent term adjustment history on the USPTO PAIR system currently shows the total number of delay days under 1.702(a)(2) for failing to respond to the Applicant's filing an Appeal Brief within four months of the filing date as being only 152 days. *This number of days is shown, even though the arrow indicators clearly show that the delay is*

being calculated as being based on the filing of the appeal brief in 2006 and ending with the issuance of the non-final rejection in 2008. Applicant therefore submits that there has been an error at the USPTO related to this calculation.

10. The correct number of days to be accorded for the USPTO delay under 1.702(a)(2) for failing to respond to Applicant's filing of an Appeal Brief within 4 months of the filing date should be the 685 days originally calculated at the time of issuance of the Notice of Allowance, and not the 152 days presently shown on the USPTO PAIR system. The difference between the originally calculated delay and the currently calculated delay (i.e., $685 - 152 = 533$) is equal to the difference between the PTA Applicant asserts should correctly be accorded (i.e., 2,125 days) and the PTA originally applied to the issued patent (i.e., 1,592 days). In other words, $2,125 - 1,592 = 533$.

11. Applicant submits that the present error in PTA accorded to the present patent relates to an issue that could not have been raised in an earlier petition under 1.705(b). At the time of issuance of the Notice of Allowance, the USPTO delay under 1.702(a) appeared to be correct, as described above. It is only after issuance of the patent that an error in the PTA calculation has been identified. Specifically, as noted above, when the USPTO proceeded to recalculate PTA to consider delay under 1.702(b), the delay under 1.702(a) was improperly reduced for some reason unknown to the Applicant. Thus, Applicant only can determine that this is a clerical error at the USPTO. Since this clerical error became know to the Applicant only after payment of the issue fee (particularly upon receipt of the Issue Notification), it is only now that Applicant has the opportunity to raise this issue via petition under 1.705(d).

12. To clarify, **Applicant submits that the present application correctly should be accorded 2,125 days of patent term adjustment.** This number correlates to the number of delay days originally calculated by the USPTO arising from delay under 1.702(a)

Appl. No.: 09/870,414
Petition Under 37 C.F.R §1.705(d)
April 23, 2010

(i.e., **901 days**) plus the number of delay days calculated by the USPTO arising from delay under 1.702(b) (i.e., **1,224 days**). In other words, the PTA should be calculated as follows:

<u>Type of Delay</u>	<u>Relevant Dates</u>	<u>Days of Delay</u>
USPTO delay under 1.702(a)(1) for failing to issue a first action within 14 months of the filing of the patent application	July 31, 2002, to November 4, 2003	462
USPTO delay under 1.702(a)(2) for failing to respond to Applicant's filing of an Appeal Brief within 4 months of the filing date	July 14, 2006, to May 29, 2008	685
Applicant's delay under 1.704(c) related to four separate requests for extensions of time for responding to four separate office actions	February 28, 2005 to May 2, 2005; October 12, 2005 to November 14, 2005; August 29, 2008 to November 25, 2008; and June 23, 2009 to August 24, 2009	(246)
USPTO delay under 1.702(b) for failing to issue the patent within three years of filing of the application	May 30, 2004, to April 20, 2010, subtracting out the time from November 14, 2005, to May 29, 2008	1,224
		<hr/> <u>2,125</u>

13. Applicant submits that the present patent is not subject to a terminal disclaimer that would affect the effective expiration date of the patent.

14. Applicant has described above the delay arising from seeking extensions of time for responding to office actions. Applicant submits there are no further instances of Applicant delay under 37 C.F.R. §1.704